

BEFORE THE KANSAS WORKERS COMPENSATION BOARD

PATRICIA STARK

Claimant

V.

RANSOM MEMORIAL HOSPITAL

Respondent

and

WAUSAU BUSINESS INSURANCE COMPANY

Insurance Carrier

Docket No. 1,060,180

ORDER

Respondent and its insurance carrier (respondent) request review of the September 22, 2014, Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on January 13, 2015.

APPEARANCES

Timothy J. Pringle, of Topeka, Kansas, appeared for claimant. Jeffrey D. Slattery, of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant sustained personal injury by accident to her left arm and both shoulders on October 6, 2011. The ALJ also found claimant's alleged cervical and lumbar injuries preexisted the accident and compensation for those conditions was denied. The ALJ found permanent impairment encompassing both upper extremities that combined for a 12 percent whole body functional impairment. Permanent partial disability (PPD) benefits were awarded based on a 45 percent work disability.

Respondent contends the ALJ erred in awarding claimant work disability and future medical treatment because such findings were based on claimant's preexisting back and neck conditions for which compensation was denied. Respondent maintains claimant's award should be limited to 12 percent whole body functional impairment for both shoulders.

Claimant argues the ALJ incorrectly denied compensation for her cervical and lumbar injuries. Claimant contends her functional impairment is 29 percent to the whole body, encompassing her cervical spine, lumbar spine and both upper extremities. Claimant maintains she proved a work disability of 75 percent. Claimant requests the Board affirm the ALJ's award of future medical benefits.

The issues presented are:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant was age 56 when she testified at the July 10, 2014, regular hearing. She lives in rural Allen, Kansas, 20 miles north of Emporia.¹ In 2008, respondent hired claimant as a radiologic technologist. Claimant worked in that capacity for respondent until her accident in this claim.

On October 6, 2011, while in respondent's break room, claimant caught her foot on a box, tripped and fell. She hit her head on a refrigerator and landed on her right elbow and right knee. She did not remember hitting her left shoulder. Claimant's alleged injuries included her neck and back. X-rays of her left shoulder revealed a fracture of the proximal humerus.

Claimant received conservative treatment for her left shoulder fracture from Christopher C. Eckland, D.O., an orthopedic surgeon, from October 7, 2011, until March 29, 2012. The treatment consisted of work restrictions, use of an immobilizer, medication and physical therapy. Claimant reported right shoulder pain during Dr. Eckland's treatment.

On March 14, 2012, respondent laid claimant off permanently for financial reasons.² Claimant thereafter contacted respondent about returning to work, but was told her lay off was permanent.

Beginning on May 29, 2012, claimant commenced authorized treatment for both shoulders with Daniel Stechschulte, M.D., an orthopedic surgeon. Dr. Stechschulte prescribed additional conservative care, and ultimately operated on claimant's shoulders. On October 24, 2012, Dr. Stechschulte performed a left arthroscopic subacromial

¹ See R.H. Trans., CI's Ex. 1.

² The nature of respondent's financial issues is not in the record, but apparently led to the elimination of claimant's position. R.H. Trans. at 53-55.

decompression and debridement, excision of the lateral clavicle and coracoplasty. On February 27, 2013, he performed a right arthroscopic subacromial debridement, biceps tenotomy, excision of the lateral clavicle and coracoplasty. Dr. Stechschulte provided post-surgical treatment and released claimant on May 20, 2013.

On November 6, 2012, the ALJ ordered a neutral medical evaluation with James Zarr, M.D., a specialist in physical medicine and rehabilitation. The order directed Dr. Zarr to “evaluate the claimant and to provide the court and the parties a written opinion about whether the claimant sustained injuries to the head, neck, or back arising from the work accident.” Claimant met with Dr. Zarr on November 26, 2012. He took a history, reviewed medical records and performed a physical examination.

Dr. Zarr diagnosed persistent low back pain and persistent neck pain that radiated into headaches. Dr. Zarr’s report states:

It does seem medically reasonable that this patient’s current complaints of neck and low back pain are attributable to the work related injury of 10/06/11. The ER report does show a chief complaint of pain in the head. I am not aware of any pre-existing conditions that would account for neck, low back or head pain. I do feel it is medically reasonable that the work related injury of 10/06/11 is the “prevailing factor” in causing her current complaints of low back pain and neck pain that radiates into the head.³

Dr. Zarr recommended conservative treatment and MRI scans of the cervical and lumbar spine.

Claimant received treatment for her neck and back injuries from Dr. Constantine Fotopoulos, who provided cervical and lumbar epidural steroid injections. Dr. Fotopoulos released claimant from treatment on January 14, 2014, with restrictions of “pushing and pulling limited to 15 pounds. Carrying no greater than 20 pounds. Lifting for the knuckle and a light/medium category occasional 20 pounds, frequently 14 pounds and constantly 6 pounds.”⁴

At the request of her counsel, claimant saw Edward J. Prostic, M.D., a board certified orthopedic surgeon, for a medical evaluation on March 4, 2014. Dr. Prostic took a history, reviewed medical records, performed a physical examination and conducted x-rays. The doctor testified regarding his diagnostic impressions:

She was post-operative bilateral shoulder surgery for which she was doing quite well. She had injured her cervical and lumbar spine, she had significant

³ Dr. Zarr report at 3.

⁴ Santner Depo., Ex. 2 at 2; Benjamin Depo., Ex. 2 at 2. The records of Dr. Fotopoulos are not in evidence.

degenerative disk disease in her neck, and she had grade 1 spondylolisthesis of the low back.⁵

In Dr. Prostic's opinion, claimant's work accident was the prevailing factor in her injury, medical condition, need for treatment and resulting disability or impairment.⁶

Based on the *AMA Guides*,⁷ Dr. Prostic opined claimant sustained a 10 percent whole body permanent impairment for the cervical spine, a 10 percent whole body permanent impairment for the lumbar spine and 10 percent permanent impairment to each upper extremity, all of which combine for an aggregate impairment of 29 percent of the body as a whole.

Dr. Prostic testified regarding claimant's preexisting conditions:

Q. Now, you've also mentioned that she had significant degenerative conditions in her cervical and lumbar spine; is that right?

A. Yes.

Q. Those are pre-existing conditions?

A. I don't have the [radiologist's] dictations of the MRI's, but the interpretations of them in the records from Dr. Fotopoulos indicate that the cervical MRI showed evidence of C5-6 cervical disk herniation and some stenosis at C5-6 secondary to the herniated disk. My x-rays showed the degenerative disk disease one level below, so what was seen on my x-rays probably preceded the accident. The cervical disk herniation may have been caused by this accident or may have occurred before. I don't know. At the lumbar spine the spondylolisthesis pre-existed the accident.

Q. Would the disk space narrowing also have pre-existed?

A. I believe so.⁸

Dr. Prostic limited claimant to light duty employment, and imposed restrictions to avoid repetitious bending or twisting at the waist, forceful pushing or pulling, or activities that require her head to be significantly away from the neutral position. The doctor opined

⁵ Prostic Depo. (July 29, 2014) at 4.

⁶ *Id.* at 15; Ex. 2 at 4.

⁷ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

⁸ Prostic Depo. (July 29, 2014) at 10-11.

claimant had good results from her shoulder surgeries but had a vulnerable cervical and lumbar spine; restrictions were therefore necessary to avoid worsening those conditions.

Dr. Prostic reviewed the list of six work tasks compiled by Mr. Santner and opined claimant can no longer perform three, for a 50 percent task loss. Dr. Prostic also reviewed the list of seven work tasks compiled by Mr. Benjamin and concluded claimant can no longer perform one task, for a 14 percent task loss.

In Dr. Prostic's opinion, claimant will require additional medical treatment, consisting of medication and physical therapy, and possibly additional surgery.

Claimant testified she experiences pain in her back, down both legs, worse in her left leg and foot. According to claimant, if she stands for extended periods, she has pain in her feet, causing painful and difficult walking, and an altered gait. Claimant says if she is on her feet for four hours, she must use a cane or crutches to get around.

Claimant testified she has pain in her neck and down her arm when she quilts or plays piano, and her hands are very painful. Claimant asserts she experiences pain in her shoulders, and her right shoulder catches when doing anything with her arms away from her body. Claimant requested continuing medical treatment because of her neck, back and leg pain. According to claimant, Dr. Eckland said her shoulder fracture could cause necrosis and the need for a shoulder replacement.

Claimant has not worked since her injury on October 6, 2011.

Dick Santner, a certified vocational rehabilitation counselor, interviewed claimant on March 17, 2014, and performed a vocational evaluation at the request of her attorney. Mr. Santner determined claimant performed six work tasks in the five years preceding her injury. Mr. Santner opined claimant's realistic post-injury earning capacity is \$372.40, based on a 40-hour week.

Steve Benjamin, a certified vocational rehabilitation consultant, interviewed claimant on July 28, 2014. He developed a list of seven work tasks claimant performed during the five year period before her injury. Mr. Benjamin evaluated claimant's earning capacity and found claimant could earn up to \$438.32 per week.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable

to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-510h(e) provides in relevant part:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 2011 Supp. 44-510e provides in relevant part:

(a) In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

. . .

(2)(A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:

(i) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;

. . .

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7 ½ % to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors,

including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

(ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.

. . .

(F) The amount of compensation for whole body injury under this section shall be determined by multiplying the payment rate by the weeks payable. As used in this section: (1) The payment rate shall be the lesser of: (A) The amount determined by multiplying the average weekly wage of the worker prior to such injury by 66 ⅔ %; or (B) the maximum provided in K.S.A. 44-510c, and amendments thereto; (2) weeks payable shall be determined as follows: (A) Determine the weeks of temporary compensation paid by adding the amounts of temporary total and temporary partial disability compensation paid and dividing the sum by the payment rate above; (B) subtract from 415 weeks the total number of weeks of temporary compensation paid as determined in (F)(2)(A), excluding the first 15 such weeks; and (3) multiply the number of weeks as determined in (F)(2)(B) by the percentage of functional impairment pursuant to subsection (a)(2)(B) or the percentage of work disability pursuant to subsection (a)(2)(C), whichever is applicable.

(3) When an injured worker is eligible to receive an award of work disability, compensation is limited to the value of the work disability as calculated above. In no case shall functional impairment and work disability be awarded together.

The resulting award shall be paid for the number of disability weeks at the payment rate until fully paid or modified. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. Under no circumstances shall the period of permanent partial disability run concurrently with the period of temporary total or temporary partial disability.

The Board finds the award should be modified as follows:

1. It is undisputed claimant sustained a non-scheduled disability involving both shoulders as a result of her compensable personal injury by accident of October 6, 2011, pursuant to K.S.A. 2011 Supp. 44-510e(a)(2)(A)(i).

2. The Board disagrees with the ALJ's conclusion claimant failed to prove her cervical and lumbar injuries were causally related to the work injury. Dr. Prostic found claimant had lumbar and cervical degenerative disc disease which likely preexisted claimant's accident. However, both Dr. Prostic and Dr. Zarr opined claimant sustained injury to the lumbar and cervical spine and that the work accident was the prevailing factor in causing such injuries.

3. As a result of the October 6, 2011, accidental injuries, claimant sustained permanent impairment of function of 29 percent to the whole body encompassing both upper extremities at the level of the shoulders, as testified to by Dr. Prostic, the only medical witness to testify in this claim.

4. Claimant is eligible to receive work disability benefits in excess of her percentage of functional impairment because: (1) the undisputed evidence establishes claimant sustained a functional impairment directly caused by the accident exceeding 7.5 percent to the body as a whole, and (2) claimant sustained a post-injury wage loss of at least 10 percent that is directly attributable to her work injury. Although claimant was laid off by respondent for financial reasons, the Board is persuaded claimant was unable to perform her pre-injury job as a radiological technologist, given the permanent restrictions imposed by Dr. Fotopoulos and Dr. Prostic.

5. The Board agrees with the ALJ's finding claimant sustained a 32 percent task loss, which consists of the mid-point between Dr. Prostic's 50 percent task loss opinion based on the task list prepared by Mr. Santner, and the 14 percent task loss opinion of Dr. Prostic based on the task list prepared by Mr. Benjamin. Equal weight is accorded the work tasks identified by the two vocational experts.

6. Neither party challenges the ALJ's findings regarding claimant's average weekly wage (AWW). The Board adopts the judge's wage calculations. Claimant's AWW before the termination of her additional compensation on March 31, 2012, was \$725.28, yielding a compensation rate of \$483.54. After March 31, 2012, claimant's AWW increased to \$835.97, yielding a compensation rate of \$555.00.

7. The Board adopts the judge's finding claimant is entitled to 116.86 weeks of TTD benefits at the rate of \$483.54 per week, increasing to \$555.00 per week on March 31, 2012.

8. The Board finds equal weight should be given to the opinions of Mr. Santner and Mr. Benjamin regarding claimant's post-injury wage earning capability. Using claimant's AWW after March 31, 2012, according to Mr. Santner, claimant is capable of earning \$372.40 per week, or a wage loss of 45 percent. According to Mr. Benjamin, claimant is capable of earning \$438.32 per week, or a wage loss of 52 percent. Averaging the opinions of Mr. Santner and Mr. Benjamin, claimant's wage loss is 48.5 percent.

9. When claimant was found to have reached maximum medical improvement (MMI), a presumption arose, pursuant to K.S.A. 2011 Supp. 44-510h(e), that the employer's obligation to provide additional medical treatment terminated. However, the Board finds claimant overcame that presumption with medical evidence establishing it is more probably true than not, additional medical treatment will be necessary. The testimony of Dr. Prostic indicates claimant will require future treatment. Dr. Prostic's opinion regarding future treatment is uncontradicted and is regarded by the Board as conclusive.⁹

CONCLUSIONS

1. As a result of her October 6, 2011, accident, claimant sustained permanent injury to her upper extremities, cervical spine and lumbar spine.

2. Claimant sustained permanent functional impairment to both upper extremities at the shoulder level, cervical spine and lumbar spine, totaling 29 percent to the whole body.

3. Claimant is entitled to an award of 116.86 weeks of TTD at the rate of \$483.54 per week increasing to \$555.00 per week on March 31, 2012, followed by PPD at the rate of \$555.00 per week based on a 32 percent task loss and 48.5 percent wage loss for a work disability of 40.25 percent.

4. Claimant is awarded future medical treatment upon application to and approval by the ALJ.

AWARD

Claimant is entitled to 25.43 weeks of temporary total disability compensation at the rate of \$483.54 per week or \$12,296.42, followed by 91.43 weeks of temporary total disability compensation at the rate of \$555.00 per week or \$50,743.65, plus permanent partial disability compensation at the rate of \$555.00 per week not to exceed \$130,000.00 for a 40.25 percent work disability.

⁹ Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive. *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978)

As of April 8, 2015, there is due and owing to claimant 25.43 weeks of temporary total disability benefits at the weekly rate of \$483.54 or \$12,296.42, and 91.43 weeks of temporary total disability benefits at the weekly rate of \$555.00 or \$50,743.65, for a total of \$63,040.07, plus 66.14 weeks of permanent partial disability benefits at the rate of \$555.00 or \$36,707.70, for a total due and owing of \$99,747.77, which is ordered paid by respondent in one lump sum, less amounts previously paid. Thereafter, respondent are ordered to pay claimant the remaining balance of permanent partial disability benefits in the amount of \$30,252.23 at the rate of \$555.00 per week not to exceed the \$130,000 statutory cap until fully paid or until further order from the Director.

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated September 22, 2014, is modified as specifically set forth in this Order.

IT IS SO ORDERED.

Dated this _____ day of April, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Kenneth J. Hursh, Administrative Law Judge